No. 1048

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM BAER EWING,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Brief of Defendant in Error.

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THE JAMES H. BARRY CO.

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BRIEF OF DEFENDANT IN ERROR.

As stated by counsel for plaintiff in error in their brief, this is an appeal from a judgment of conviction rendered in the District Court of the United States for the Northern District of California on February 6, 1904.

The questions raised by plaintiff in error relate solely to the sufficiency of the indictment, and we shall consider them briefly in the order in which they are discussed in the brief of counsel.

At the very outset, it will be observed that no demurrer or motion to quash the indictment was interposed on behalf of plaintiff in error, the defendant in the

lower Court. The Transcript of Record shows (p. 39) that on January 14, 1903, plaintiff in error entered a plea of not guilty to the indictment, and thereafter (p. 62, Tr. of Rec.) on February 1, 1904, a jury was impaneled to try the cause. It further appears that after the jury had been impaneled, and without any previous objections having been made, the objections found on pages 40 to 47, inclusive, of the Transcript of Record, were interposed and overruled by the Court. Thereafter, as appears on pages 62 and 63 of the Transcript of Record, the Government introduced evidence tending to prove all of the allegations contained in the indictment, and the jury returned a verdict finding the defendant guilty as charged. The verdict is found on page 48, Transcript of Record.

The first point urged on behalf of plaintiff in error is found at page 2 of counsel's brief, and is to the effect that the indictment is fatally defective, as it fails to charge that the alleged fraudulent scheme originally embraced the design and purpose to use the mails.

Let us briefly examine the allegations of the indictment in this particular. The indictment consists of three counts, differing only in the dates and the substance of the letters alleged to have been deposited in the United States mail in furtherance of the scheme to defraud. At page 6 of the Transcript of Record occur the following allegations, omitting the preliminary

allegation: "William Baer Ewing and George B. "Chaney * * * on the 31st day of December, in "the year of our Lord one thousand nine hundred, at "the City and County of San Francisco, in the State "and Northern District of California, then and there "being, did then and there devise a scheme to defraud "* * * and certain other persons whose names are "to the Grand Jurors aforesaid unknown * * * "which said scheme to defraud was to be effected by "opening correspondence and communication with "such persons, and by distributing advertisements, cir- "culars, prospectuses and letters by means of the Post- "office establishment of the United States, and by incit- "ing such persons to open a correspondence through "such Postoffice establishment, with them, the said "William Baer Ewing and George B. Chaney, con- "cerning said scheme, and which said scheme was then "and there as follows, to-wit":

Counsel quote the case of *Stokes* vs. *U. S.*, 157 U. S., 187, as authority for the proposition that an indictment for this offense must charge, among other things, that the persons accused intended to effect the scheme to defraud, which has been devised by them, by opening or intending to open correspondence with some other person through the Postoffice establishment or by inciting such other person to open communication with them. Counsel seem to complain that the word "intended" is

not used in the indictment with reference to the use of the Postoffice establishment.

The cases of *U. S.* vs. *Harris,* 68 Fed., 347, and *U. S.* vs. *Long,* 68 Fed., 348, are cited on pages 3 and 4 of counsel's brief for the purpose of showing that an indictment must charge directly, and not by way of recital, that the scheme included the intended use of the mail.

We respectfully submit that the cases cited in no way tend to show that the indictment in the case at bar is defective in this particular, for the reason that the language of the indictment itself shows that this charge *is* made directly and certainly, and not by way of recital. The cases cited in which indictments were held bad, all relate to indictments wherein the language as to the intended use of the mails is widely different from the language of the present indictment. In the Harris case, the indictment is not set forth in the opinion of the Court and is therefore not available for comparison.

In the Long case, the allegation was "that Benedict "Long * * * having devised a scheme to defraud "one * * * to be effected by opening correspond- "ence and communication with said * * * by "means of the Postoffice establishment of the United "States, in the furtherance and execution of said "scheme, did knowingly, wilfully, unlawfuly and fe- "loniously place and cause to be placed in the Post-

"office of the United States * * * a certain "letter," etc.

In the case of *United States* vs. *Smith,* 45 Fed., 561, cited by counsel on page 4 of their brief, the allegation of the indictment was, that the defendant "having there- "tofore devised, as aforesaid, the aforesaid scheme to "defraud, to be effected by opening correspondence "with said * * * and said other persons by means "of the Postoffice establishment of the United States, "and by inciting the said * * * and said other "persons to open communication with him," did in and for executing said scheme and in attempting so to do deposit, etc.

In the case of *U. S.* vs. *Clark,* 121 Fed., 190, the language of the indictment is not set forth in the opinion of the Court, but a reading of the opinion would indicate that its averments were very different to those of the present indictment. That case holds, as shown both by the syllabus and the opinion, that an indictment for this offense must show that the scheme was "to be effected" through the medium of the mails as an essential part.

The above cases are the only ones cited by counsel in their attempt to show that this indictment is defective in the particular mentioned. A careful comparison of the language of the indictments in the cases cited in the brief of counsel, and the indictment in the case at bar will show that they are widely and essentially different.

The present indictment charges that the plaintiff in error and his co-defendant "*did then and there devise* a "scheme to defraud * * * which said scheme to "defraud *was to be effected by opening correspondence* "*and communication with such persons, and by dis-* "*tributing advertisements, circulars, prospectuses and* "*letters by means of the Postoffice establishment of the* "*United States, and by inciting such persons to open a* "*correspondence through such Postoffice establishment,* "*with them, the said * * * concerning said scheme.*"

Applying the rule laid down in the Stokes case, we find in this indictment a charge (1) that the persons charged devised a scheme to defraud, and (2) that they intended to effect this scheme by opening and intending to open correspondence with other persons through the Postoffice establishment, and by inciting such other persons to open communication with them. The third essential for such an indictment pointed out in the Stokes case, namely, the deposit of a letter in the Postoffice in carrying out the scheme, is set out in another portion of the indictment.

That this indictment comes squarely within the rule laid down in the Stokes case, there can be no doubt. There is a plain, clear, direct, unmistakable charge that these defendants *did then and there devise a scheme to defraud;* it is then charged in direct and certain terms that *said scheme to defraud was to be effected by opening correspondence * * * by means of the Post-*

*office establishment of the United States, and by inciting such persons to open a correspondence through such Postoffice establishment with them * * * concerning the scheme.*

Nothing is here left to inference; each allegation is plain and there can be no doubt in the mind of any reasonable man that the language of the indictment contains a plain charge that the fraudulent scheme embraced a contemplated use of the mails. Plaintiff in error is charged with devising a scheme to defraud, which said scheme to defraud was to be effected as above set forth. *When* was said scheme to defraud, to be *effected by opening correspondence,* etc.? From the language of the indictment, *at the time* the plaintiff in error and his co-defendant *did then and there devise it.*

In this connection, we call the attention of the Court to the case of *U. S.* vs. *Hoeflinger,* 33 Fed., 469, wherein the indictment contained the following averment: "Said scheme and artifice to be effected by opening "correspondence * * * with * * * said "unknown persons by means of the Postoffice establish- "ment of the United States." The learned Judge in that case held this indictment good on demurrer. The averments in the one at bar are more direct than in that case and surely this indictment should be held good after plea and verdict.

We also call attention to the case of *Weeber* vs. *U. S.,* 62 Fed., 740, decided by Mr. Justice Brewer of the

United States Supreme Court, sitting as Circuit Justice. The indictment is not set out in *haec verba* in the opinion, but the Court says on page 741: "The indictment "before us charges a scheme to defraud, to be effected "by means of a correspondence through the Postoffice "establishment, and that in executing such scheme the "defendant placed a letter in the Postoffice, and subse- "quently received it therefrom." The Court on appeal from a judgment of conviction held the indictment sufficient.

These observations will, we think, effectually dispose of the first contention of counsel.

We come now to the second, namely, that the indictment is fatally defective, as it fails to negative the representations alleged to have been made.

In beginning a discussion of this point, we may observe that in our judgment, no such question has been raised by the Assignment of Errors (pp. 60 and 61, Tr. of Rec.). The Assignment of Errors refers specifically to these documents: (1) the defendant's written objections to the introduction of evidence, which are found on pages 40 to 47, inclusive, of the Transcript of Record; (2) the motion for a new trial, which appears on pages 49 and 50 of the Transcript of Record, and (3) the motion and arrest of judgment, which appears on pages 63 to 71, inclusive, of the Transcript of Record. After a careful examination of these documents referred to in the assignment of errors, we respectfully

submit that we have been unable to discover that this point has been raised at all in such a manner that the Court can take notice of it here. Subdivision 4, Rule 24, of this Court, is applicable in such a case.

But aside from this consideration, we believe that the indictment fulfills all the requirements of the statute, and in any event, after verdict is entirely sufficient. Counsel begins the discussion of this point (brief, page 6), by stating that "it is an established principle of "law that the indictment should negative by specific "and distinct averments such material pretenses as the "prosecution expects to prove false, so that the defend- "ant may be given notice of what he is to defend "against; and these averments of falsity should be as "specific and distinct as an assignment of perjury." They do not quote a single case wherein a charge was made under the statute applicable to the case at bar, which sustains their contention.

The Missouri and Massachusetts cases cited at pages 8 and 9 were all cases arising under peculiar local statutes. The Peacock case was a prosecution for obtaining by false pretenses the signature of a party to an instrument of writing, and all of the others, with the exception of the case of the *U. S.* vs. *Pettus,* were cases wherein the charge was obtaining money or property by false pretenses. Counsel say, with great confidence, that "this precise question was presented" in the Peacock case and in the Petus case, whereas close examination of

those cases will disclose the fact that the precise point was not decided at all. The indictment in the Peacock case is not set out in the opinion of the Court, but an examination of the opinion shows that the allegations discussed by the Court are in nowise similar to the allegations of the indictment at bar. The case of *U. S.* vs. *Pettus,* 84 Fed., 791, was a charge of perjury under Section 5392, R. S., which is a totally different charge to the one at the case at bar.

It may be safely asserted, that not a single case can be found in the United States Reports which holds that an indictment for the offense herein charged, which is framed as this indictment is, is defective in the particular contended for by counsel. No such case has been cited, and it is safe to say that none exists.

In this connection, we respectfully call the attention of the Court to the case of *U. S.* vs. *Bernard et al.,* 84 Fed., 634. At page 636, occurs the following language: "In some of the indictments, the second count, "while alleging the intent to convert any moneys sent "them to the defendants' own use, does not allege the "falsity of any specified statements contained in the letters or circulars quoted and alleged to have been sent "by mail. I do not think this is necessary where the "count explicitly charges, as the second counts charge "that the money was sought for the ostensible purpose "of investment in business for the sender's account, but

"with the real intent to convert the moneys to the de-
"fendants' own use."

The whole opinion in this case is instructive upon this, and upon the next point urged by counsel at page 10 of their brief, namely, that the indictment is fatally defective, as it fails to allege that there was intent upon the part of the plaintiff in error to defraud anyone.

The case above referred to is cited by counsel for plaintiff in error in support of their third objection, but the language above set out is not quoted. The doctrine enunciated by that case is, briefly stated, that a scheme is as much "a scheme to defraud" under Section 5480, R. S., which has for its object the obtaining of money for investment in a regular business enterprise by means of false representations, as is one which has for its object the conversion of the money obtained to the use of the defendants. In the indictment at bar, on pages 10 and 11, of the Transcript of Record, occur the following allegations:

"And it was further devised by and between the said
"William Baer Ewing and * * * that each and
"all of the said representations aforesaid, should be
"made and they were so made to the said * * *
"and that said scheme should be entered into and car-
"ried out, and it was so entered into and carried out
"by the said William Baer Ewing and * * *
"with the intent and for the purpose of inducing the

"persons aforesaid * * * and any other persons "who might be induced to enter into correspondence "with the said William Baer Ewing and * * * "to give to them, the said * * * certain property, "goods and money of the various persons aforesaid, and "each of them, and of the other persons who might be "induced to enter into corrspondence with the said "* * * * * * * * * * * and said represen- "tations so made as aforesaid, and each and all of them, "was and were utterly false and untrue in fact, and said "representations, and each and all of them, was and "were well known by the said William Baer Ewing "and * * * to be utterly false and untrue in fact, "at the time they were so made as aforesaid; *and said "representations were made solely for the purpose of "obtaining money, goods and property of the said per- "sons whom they might induce to enter into corre- "spondence with them.*"

Thereafter, on page 11 and at the top of page 12 of the Transcript of Record, appear allegations to the effect that the parties therein named were induced to give and did give to the plaintiff in error and his co-defendant certain moneys, by reason of the false representation made by them.

We believe that these allegations of the indictment sufficiently show that the third point raised by plaintiff in error is untenable.

We have now, we believe, fully disposed of the va-

rious points raised on behalf of plaintiff in error, and we respectfully submit that for the reasons stated not one of them is tenable.

We submit that the judgment of the District Court should be affirmed.

Respectfully,

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